No. 80-544

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that petitioner's refusal to bargain with the Union about petitioner's decision to close a portion of its operation and to discharge the employees in that portion of its operation violated Section 8(a)(5) and (1) of the National Labor Relations Act.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

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Section 8(a)(5), 29 U.S.C. 158(a)(5) 5, 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board are reported at 242 N.L.R.B. No. 72 (Pet. App. 21a-37a).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 38a.

STATEMENT

1. Petitioner, a New York corporation, supplies employees to perform housekeeping and maintenance services at the premises of its various commercial customers. Petitioner hires its own employees and, as their sole employer, trains and supervises them in the performance of the contracted-for services at its customers' premises (Pet. 2). During the spring of 1977, petitioner serviced between two and four nursing care institutions, including the Greenpark Care Center in Brooklyn, New York. Petitioner had been under contract with Greenpark since May 3, 1976, and employed approximately 35 employees there. The parties' contract required Greenpark to reimburse petitioner for its weekly payroll and fringe benefits

for its employees at Greenpark and to pay petitioner a weekly "professional services fee," which initially was set at $500, but was reduced to $250 as of November 1, 1976 (Pet. App. 4a, 28a-29a; A. 44, 46).[1] The contract also provided for termination by either party upon 30 days' written notice (A. 44).

In an election conducted by the Board on March 31, 1977, petitioner's Greenpark employees chose the Union[2] as their collective bargaining representative and on May 11, the Board certified the Union as the employees' exclusive bargaining representative. By a July 12, 1977 letter to petitioner, the Union requested a meeting to negotiate a collective bargaining agreement. Petitioner never responded to the Union's letter (Pet. App. 4a, 29a, 31a).

In the interim, petitioner and Greenpark had been experiencing problems in connection with their contract (Pet. App. 31a). In April 1977, petitioner informed Greenpark that it was losing money on its Greenpark operation and needed an increase in order to be able to continue providing services at Greenpark (A. 71). On June 30, petitioner requested that its professional services fee be increased to $500, and on July 6, petitioner sent Greenpark a mailgram stating that, unless the requested increase were granted, petitioner's services would be discontinued as of August 1, 1977 (Pet. App. 31a; A. 40).[3]

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[1] "A." refers to the appendix in the court of appeals.

[2] District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

[3] Petitioner characterized the requested increase as being one "in profits per week" (A. 40).

Petitioner failed to receive the requested increase, and on July 25 it confirmed that it would terminate its services at Greenpark as of August 1, 1977 (Pet. App. 31a; A. 48). Petitioner never notified the Union of the intended closing (Pet. App. 4a, 29a-31a; A. 118).

On July 28, petitioner informed its Greenpark employees that as of July 31 the Greenpark operation would be closed and they all would be discharged (Pet. App. 4a, 29a, 31a). One of the employees then notified the Union of the anticipated closing (A. 117-118). Edward Wecker, the Union's vice-president, immediately telephoned the administrator of Greenpark, who confirmed that petitioner was terminating the contract and discharging the employees (A. 87, 91-92). When Wecker asked if Greenpark itself could retain the employees, the Greenpark administrator told him that the contract between petitioner and Greenpark prohibited Greenpark from hiring any of petitioner's employees for 90 days following termination of the contract (Pet. App. 31a; A. 44, 92-93).

Wecker then telephoned Leonard Marsh, a one-third owner and secretary-treasurer of petitioner, who stated that petitioner was "pulling out" because it was not making enough money. Wecker asked Marsh if he could "hold on a little longer" until the Union and petitioner could meet to discuss "how to keep the people working." Marsh refused, on the ground that, under the contract, petitioner would be required to remain at Greenpark for another full 30 days if it stayed past the notified termination date. Marsh added that, if Wecker could persuade Greenpark to waive the 30-day provision, Marsh "might be able to swing" a discussion with the Union. Wecker inquired about the possibility of petitioner's hiring the employees for its other locations, to which Marsh

responded in the negative. Marsh's response to Wecker's request that petitioner meet with the Union to discuss the matter was that they had "nothing to discuss." (Pet. App. 5a, 29a, 31a-32a.)

Thereafter, Wecker had telephone conversations and a meeting with representatives of Greenpark, but they told him that Greenpark could do nothing about petitioner's closing its Greenpark operation and discharging the employees (A. 98-101). On July 31, petitioner discontinued its Greenpark operation and discharged all of its Greenpark employees (Pet. App. 29a).

2. Relying in large part (Pet. App. 33a-34a) on this Court's decision in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), the administrative law judge rejected petitioner's contention that its decision to close its Greenpark operation was a management prerogative outside the scope of mandatory collective bargaining. The administrative law judge found that "[t]here was no capital involved" when petitioner decided to terminate the Greenpark job; that petitioner's "regular and usual method of running its affairs" involves initiating and completing work at various customer installations; and that "[t]he closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size" (Pet. App. 33a). In these circumstances, "where it ha[d] not been shown that [petitioner's] decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of the enterprise,' " the administrative law judge concluded that petitioner had a duty to bargain with the Union about the decision to close the Greenpark operation (*ibid.*, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied

and case remanded for additional evidence, 582 F.2d 720 (3d Cir. 1978)).

The Board upheld the administrative law judge's rulings, findings and conclusion that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the decision to close the Greenpark portion of its operations and the effects of the closing on the employees (Pet. App. 22a-23a).[4] The Board ordered petitioner, *inter alia*, to bargain with the Union about the decision to terminate the Greenpark operation and the possible resumption of it; if an agreement to resume the Greenpark operation were reached, to offer reinstatement at that operation to the discharged employees and to embody any such understanding in a written agreement; or if an agreement to resume the Greenpark operation were not reached, to bargain with the Union concerning the effects of the termination decision and to offer the terminated employees reinstatement to positions for which they were qualified at any of petitioner's other cleaning and maintenance operations (Pet. App. 22a-23a, 25a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-20a). Al-

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[4] No issue is presented here concerning the Board's finding that petitioner unlawfully refused to bargain about the *effects* of the closing on the employees, since petitioner consented to enforcement of that portion of the Board's order by stipulation filed in the court of appeals (Pet. App. 5a; A. 21-22). Nor has petitioner ever disputed the Board's additional conclusion (Pet. App. 21a-22a n.1) that petitioner also refused to bargain with the Union, in violation of Section 8(a)(5) and (1), by failing to respond to the Union's July 12, 1977 letter demanding such bargaining (Pet. App. 5a). Thus, only the Board's determination that petitioner was required to bargain concerning its decision to terminate its Greenpark operation is at issue here.

though it recognized (Pet. App. 11a; footnote omitted) that a "partial closing affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute," the court emphasized (Pet. App. 10a-12a) that there is no *per se* rule mandating bargaining about all partial closing decisions: "the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" (Pet. App. 12a).

The court concluded (Pet. App. 13a-14a) that no such showing was made on the facts of the present case. It found material neither petitioner's assertion that it was losing money at Greenpark nor the fact that petitioner's financial losses were not attributable to labor costs (since, under the contract, Greenpark paid petitioner's employees' salaries and fringe benefits).[5] In the court of appeals' view, "the decisive factor * * * is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision" (Pet. App. 14a). The court found "[o]n the record here * * * sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (takebacks) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give [peti-

[5] It was primarily on the basis of those two factors that Judge Kearse dissented from that portion of the court's decision upholding the Board's conclusion that petitioner violated Section 8(a)(5) and (1) by refusing to bargain over the decision to close Greenpark (Pet. App. 16a-20a).

tioner] an increased management fee." "At least," the court concluded, if petitioner "had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution" (Pet. App. 14a).

ARGUMENT

1. Petitioner urges (Pet. 15) the adoption of a *per se* rule that "there is no duty to bargain over an economically motivated decision to terminate a portion of a business enterprise" (Pet. 10). The court of appeals properly rejected this argument, holding that, while there is an initial presumption that a partial closing is a mandatory subject of bargaining, the facts of each case must be taken into account in finally determining whether an employer has an obligation to bargain about a decision to close a portion of its business (Pet. App. 10a-12a).[6]

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[6] The Third Circuit adopted an approach similar to that of the court below in *Brockway Motor Trucks, supra.* Both courts begin their analysis with a presumption that an issue so directly affecting employee job rights as a decision to terminate part of an enterprise is subject to mandatory bargaining (Pet. App. 11a; 582 F.2d at 735). Both courts hold, however, that that presumption may be rebutted by countervailing employer evidence demonstrating, for example, that bargaining over the decision at issue would be futile or that the closing was due to emergency financial considerations (Pet. App. 11a-12a; 582 F.2d at 738-739). The position of the court below (Pet. App. 12a, 13a n.8) that accommodation of the interests of management and labor must occur within the statutory framework and that the focus must be on whether the purposes of the Act would be furthered by the decision to impose a duty to bargain in a particular case does not indicate any fundamental

The court of appeals' approach is consistent with that employed by this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964). There, the Court held that the employer was required to bargain collectively about a decision to contract out its maintenance operations and terminate its own maintenance employees. Noting that the "decision to contract out the maintenance work did not alter the Company's basic operation" and that no capital investment was contemplated, the Court concluded that, on "[t]he facts of the present case," requiring the employer to bargain about this subject "would not significantly abridge his freedom to manage the business." 379 U.S. at 213. In those circumstances, the Court held that it was appropriate to require the employer to afford the employees "an opportunity to negotiate a mutually acceptable alternative" to the blanket elimination of their jobs, by such cost saving techniques as "reducing the work force, decreasing fringe benefits, and eliminating overtime payments." *Id.* at 213-214. The Court added that, "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." *Id.* at 214. As discussed at pages 5-7, *supra*, similar considerations obtain in the present case and were the specific basis for the decision below.

Contrary to the contention of petitioner (Pet. 15) and amicus, the Chamber of Commerce of the United States (Br. 5), the decision below is not inconsistent

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disagreement between the two courts, but merely a difference in emphasis. See 582 F.2d at 739.

with Justice Stewart's concurring opinion in *Fibreboard*.[7] The court of appeals specifically noted (Pet. App. 13a n.8) that certain decisions may be "within managerial prerogative and not subject to mandatory bargaining" because they involve " 'a matter of fundamental entrepreneurial discretion.' " The administrative law judge had found, however, that there was no such " 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of [petitioner's] enterprise.' " Pet. App. 33a, quoting *Brockway Motor Trucks*, 230 N.L.R.B. 1002, 1003 (1977), enforcement denied and case remanded for additional evidence, 582 F.2d 720, 739-741 (3d Cir. 1978).[8]

Both the majority and the concurring opinions in *Fibreboard* emphasized (379 U.S. at 213-215, 218,

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[7] Justice Stewart, in whose concurrence Justices Douglas and Harlan joined, agreed that under the facts presented in *Fibreboard* there was a duty to bargain. He cautioned (379 U.S. at 223), however, that

> [n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding * * * managerial decisions [that] lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. * * * [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from [the] area [of mandatory bargaining].

[8] Indeed, he had found (Pet. App. 33a) that "[t]here was no capital involved" in the closing of petitioner's operations at this one site, and that the closing "in no sense altered the nature of its business" or "substantially affect[ed] its total size."

224-225) that the holding of that case depended on its particular facts. Similarly, the decision of the Board, which was upheld by the court of appeals, reflects an individualized appraisal of the facts of this case and does not control other situations in which the impact of collective bargaining on the legitimate interests of an employer may be greater.[9]

2. Once the decision below is properly viewed as largely dependent on the facts of the particular case, it becomes apparent that there is no square conflict between it and the decisions of other courts of appeals, since all of the cases relied on by petitioner are factually distinguishable from the present case, and since none adopts a *per se* rule that an employer has

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[9] *See, e.g., Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76, 102 L.R.R.M. 1606, 1607 (1979) ("Board does not require an employer to bargain over the closing of an operation in situations, such as here, where the decision is predicated on economic factors so compelling that bargaining could not alter them"); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972) ("We do not believe that the Act contemplated eliminating the prerogative of an employer, as here, to eliminate itself as an employer" by closing down a distinct line of business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971) ("decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much 'at the core of entrepreneurial control' "); *Sucesion Mario Mercado E Hijos d/b/a Central Rufina*, 161 N.L.R.B. 696 (1966) (no duty to bargain where compelling economic circumstances necessitated employer's decision to cease its sugar cane grinding operations for the season and contract out this work; " 'our condemnation in *Fibreboard* and like cases of unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved' " (*id.* at 700, quoting *Westinghouse Electric Corporation (Mansfield Plant)*, 150 N.L.R.B. 1574 (1965)).

no duty to bargain over an economically motivated decision to terminate a portion of its business.

While *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976), may contain the "most recent[] and cogent[]" (Pet. 11) statement of the rule urged by petitioner, that statement is mere dictum. The court in that case found it "unnecessary to discuss" the Board's finding that the decision to close one of the company's plants was a mandatory subject of bargaining in light of the Board's failure to order remedial relief for that violation (533 F.2d at 1039). In any event, the Eighth Circuit in addition noted (*id.* at 1038-1039 n.9) facts demonstrating the " 'pressing economic necessity' " underlying the employer's decision to close the plant. Similar facts were present in the other Eighth Circuit decisions relied on by petitioner and the *Royal Typewriter* court.

In *NLRB* v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965), three out of an employer's four Omaha-area customers cancelled their contracts with the employer (*id.* at 899), and the employer could not continue to serve its remaining Omaha customer "alone without incurring substantial financial loss." *Id.* at 902. In these circumstances, the court found that the "rationale of *Fibreboard* as applied to the facts of this case does not support the Board's decision." *Ibid.* Similarly, in *NLRB* v. *Drapery Manufacturing Co.*, 425 F.2d 1026 (8th Cir. 1970), the court held that the employer had no duty to bargain about its decision to close down its drapery operations after years of suffering "increasing losses" (*id.* at 1027). Moreover, the court distinguished *Fibreboard* on the ground that there "the work continued, with no major capital decision taking place," whereas in the case before it there was

"a major shift in capital investment": the company's machinery "was dismantled and removed from the premises and the drapery work was no longer controlled in any way by the company" (*id.* at 1028). In drawing that distinction, the Eighth Circuit relied (*ibid.*) on its previous decision in *NLRB* v *Adams Dairy, Inc.*, 350 F.2d 108 (1965). In that case, the employer had decided to terminate distribution of its own milk. In holding that such a decision was not a mandatory subject of bargaining, the court contrasted it with the situation in *Fibreboard* (*id.* at 111): "there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment." [10]

The Ninth Circuit employed a similar analysis in holding that an employer had no duty to bargain about its decision to terminate its operations in one city and relocate as a minority partner in a joint venture. *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933 (1967). The court emphasized the factual differences between *Fibreboard* and that case,

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[10] In *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 257 (1970), the Eighth Circuit relied on *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), to hold that an employer had no duty to bargain concerning its decision to close one of its cafeterias. To the extent that *William J. Burns International Detective Agency, Inc.*, *supra*, 346 F.2d at 902, and *Adams Dairy, Inc.*, *supra*, 350 F.2d at 111-113, suggest that *Darlington* compels the conclusion that partial closing decisions are not mandatory subjects of bargaining, they are in error. As petitioner concedes (Pet. 8-9), that issue was not presented in *Darlington*.

citing facts showing that the decision in *Transmarine* "made fundamental changes in the direction and operation of the corporate enterprise, which greatly affected its capital, assets, and personnel," and concluding that "the decision here brought about a major commitment of capital and a fundamental alteration of the corporate enterprise; unlike *Fibreboard*, it was not merely a decision to achieve economies by reducing the work force and fringe benefits of the union." *Id.* at 937. Finally, in *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (1969), the Tenth Circuit held that an employer had no duty to bargain about closing a terminal after it had "lost the major part of its * * * business [in that area,]" where "[n]o amount of collective bargaining could erase the economic facts that gave rise to the Company's decision to close and its change of operation could in no way be characterized as a 'farming out' or other procedure to continue its operation in a new or different manner." The "conflicts" alleged by petitioner are thus nothing more than differences in results dictated by the differences in the facts presented by the respective cases relied on by petitioner.[11]

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[11] Petitioner's attempt (Pet. 12) to establish a conflict between the decision below and those of the Fourth Circuit similarly fails. That court's decision in *NLRB* v. *Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615, 93 L.R.R.M. 2297 (unpublished opinion), officially reported mem. decision, 541 F.2d 277 (1976), was based on its misapprehension that *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), held that a partial closing is an unfair labor practice *only* if it is motivated by an anti-union purpose. See note 10, *supra*. And, as petitioner recognizes (Pet. 12), the statements of the court in *NLRB* v. *North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637 (1976), were mere

3. The Chamber of Commerce contends (Br. 3-4, 7-8) that the decision below fails to provide a sufficiently clear standard to guide management in determining whether to bargain collectively with its employees before effecting a partial closing and thus eliminating their jobs. As demonstrated at pages 8-10, *supra*, however, the approach adopted by the Second Circuit in the present case is essentially that which this Court employed in *Fibreboard*. Just as *Fibreboard* left the scope of an employer's obligation to bargain about "contracting out" or "subcontracting" to development on a case-by-case basis, so may the bargainability of partial closings properly be left to such development. The Chamber's exclusive focus (Br. 4-5) on management's interest in being able "to proceed decisively" and with "crisp responsiveness" to eliminate "marginal or uneconomic operations" ignores the "countervailing interests of the employees in a decision immediately affecting their fortunes." *Brockway Motor Trucks*, *supra*, 582 F.2d at 734 n.83.[12] Moreover, it ignores the benefits that man-

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dictum, since in that case the employer's claims of economic justification were held to be pretextual.

[12] Similarly, the Chamber's concern (Br. 6) that, if a decision to close part of an enterprise were a mandatory bargaining subject, employees would strike in an effort to persuade the employer not to eliminate their jobs assumes that the only legitimate interests are those of management and, thus, that management is entitled to protection from such economic power as the employees may be able to wield in the protection of their own livelihoods. But, as *Brockway Motor Trucks* recognizes (582 F.2d at 734), "[o]ne of the major norms governing the operation of the federal labor laws is that both sides of the controversy, the employer's and the employees', should be seen as crucial, and one should not be exalted to the exclusion of the other."

agement may derive from "sitting down with the union and discussing, even briefly, the decision to close a plant * * *" (*ibid.*), for "labor history is replete with instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Id.* at 736. Accord, *Fibreboard*, *supra*, 379 U.S. at 213-214.

4. Finally, petitioner's suggestion (Pet. 15-16) that there is inadequate support for the lower court's finding that "bargaining could reasonably [have] be[en] expected to modify or reverse [petitioner's] decision" presents only a factual issue, which does not warrant review by this Court. In any event, petitioner's attack on the court's finding is without merit.

Petitioner asserts (Pet. 16) that the finding is refuted by the following factors: (1) Greenpark had no bargaining relationship with or other obligation to the Union; (2) Greenpark had refused to waive the 30-day provision in its contract with petitioner, which would have permitted petitioner to bargain with the Union without being obligated to remain at Greenpark for a full additional month; and (3) Greenpark had never suggested a reduction in staffing in order to increase petitioner's fee during negotiations between the parties in June and July 1977.

Petitioner overlooks that it had an obligation to bargain with the Union when the Union first requested bargaining on July 12 (see note 4, *supra*), and that it ignored that request and unilaterally announced its decision to close its Greenpark operation more than two weeks later, without prior notice to the Union. Had petitioner timely responded to the Union's bargaining request and given the Union prompt notice of its economic difficulties and an op-

portunity to bargain over the projected closing, the Union would have had a strong incentive to cut labor costs in order to prevent the total elimination of jobs. If the Union had been willing to accept such a cut, petitioner could have notified Greenpark of a concomitant reduction in labor costs and requested an increase in its management fee. Greenpark might well have been willing to accept a total package that cost it no more, but merely redistributed the costs between petitioner and the employees.

In short, petitioner has failed to demonstrate that bargaining would have been futile or that it would have resulted in any delay of the closing, if petitioner had timely responded to the Union's bargaining request. Indeed, petitioner has failed to demonstrate any legitimate economic justification for its refusal to provide the Union "with an opportunity to negotiate a mutually acceptable alternative" to the closing and resulting discharge of some 35 employees. *Fibreboard, supra*, 379 U.S. at 214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board

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